Yahya Hussein Mohsen Abdulrab v Public Prosecutor

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05(M)-43–04 OF 2020(S)
TENGKU MAIMUN CHIEF JUSTICE, ZAWAWI SALLEH AND NALLINI PATHMANATHAN FCJJ
5 SEPTEMBER 2021

Criminal Procedure — Trial — Accused's counsel at trial flagrantly incompetent — Whether counsel's flagrant incompetence in handling defence's case denied accused of fair trial — Whether conviction should be set aside and accused acquitted and discharged — Whether Court of Appeal erred in ordering accused's retrial — Matters court should consider when deciding whether or not to order retrial

Following a trial, the High Court found the appellant, a Yemeni, guilty of a charge of trafficking in 1,800.28g of methamphetamine ('the drugs') and sentenced him to death pursuant to s 39B(2) of the Dangerous Drugs Act 1952 ('DDA'). Customs officers found the drugs when they scanned and searched a bag ('P2') that was in the appellant's possession shortly after he arrived at the Tawau Airport in Sabah on a flight from Kuala Lumpur. In his defence at the trial, the appellant testified that he had no knowledge about the drugs in P2; that P2 was handed to him in a packed state by his wife's brother-in-law ('Mickey' or 'Mr Tee') to deliver to a friend in Tawau; and that the appellant had disclosed the telephone number of Mickey's friend in his cautioned statement to police as well as to his counsel at the trial. The trial judge, however, found that the only defence raised by appellant's counsel at the trial was that there was a discrepancy in the weight of the drugs between that recorded by the Customs officers at the time of his arrest and the weight recorded by the government chemist to whom the drugs were sent for analysis. The trial court dealt with the issue and resolved it in favour of the prosecution, ruling that the drugs that were seized from P2 were the ones that were produced in court. However, with regard to the appellant's testimony that he had no knowledge of the drugs in P2 and the issue of 'Mickey', the trial court found that these matters were never put by appellant's counsel to the prosecution's witnesses during cross-examination. As a result, the trial judge concluded at the end of the trial that 'Mickey' was a fictitious character made up by the appellant and that the appellant's story was a mere denial of the charge and insufficient to rebut the presumption under s 37(d) of the DDA that he had knowledge of the drugs in P2. The trial court found that the prosecution had proven its case beyond reasonable doubt to warrant the conviction and sentence. In his appeal to the Court of Appeal ('COA') against the decision, the appellant asserted that he was denied of a fair trial because of the flagrant incompetency of his trial

lawyer who had merely put forth the alleged discrepancy in the weight of the drugs as the only defence. The appellant said that even though his wife (DW2) was present at the trial, his lawyer never called her as a witness to corroborate his story; nor did the lawyer make any submissions at the close of the prosecution's case and was absent when the verdict in the case was delivered. The appellant came to know later that his trial counsel had been suffering from cancer and had died before the decision in the trial was delivered. Based on the appellant's submissions and the additional evidence that he was allowed to tender at the appeal, the COA found that the appellant's trial lawyer had in fact been so flagrantly incompetent that the appellant was denied of a fair trial. The COA, however, did not acquit and discharge the appellant but ordered a retrial for the reason that there was no fault on the part of the prosecution and that if it were to acquit and discharge the appellant it would give the impression that an acquittal on appeal could be easily secured if an accused used the reason that the lawyer who had handled his defence at the trial had been flagrantly incompetent.

Held, unanimously allowing the appeal; acquitting and discharging the appellant:

(1) Based on the established principles of fairness, the Court of Appeal ('COA') should not have ordered the appellant to be re-tried — but should have acquitted and discharged him — after rightly finding that his counsel's flagrant incompetence had denied the appellant of a fair trial and caused him a miscarriage of justice (see para 81).

(2) On an objective assessment of the additional evidence that was tendered before the COA, the COA correctly found that the appellant's counsel at trial had: (a) failed in his duty to put the defence's case to the prosecution's witnesses during cross-examination thereby causing the trial judge to find that the appellant's narrative about 'Mickey' and the entire transaction involving him — which was raised for the first time during the defence's case — was an afterthought; (b) refused generally to consider the appellant's narrative and instead advanced the sole defence concerning the discrepancy in the weight of the drugs — which issue the trial judge correctly found was in itself insufficient to cast a reasonable doubt on the prosecution's case; (c) avoided advancing the appellant's actual narrative which would have had a better chance of exonerating him; (d) failed to call the appellant's wife (DW2) to testify even though she was present at the trial. Her evidence could have corroborated the appellant's contention that he had no knowledge of the drugs in P2 and that it had been packed and handed to him by 'Mickey'. Her evidence might also not have caused the trial judge to dismiss 'Mickey' as a fictitious character; and (e) only met the appellant once in prison and once more briefly in court and made no submissions at the end of the prosecution's case (see paras 48–52).

(3) On the totality of the evidence, the appellant had, on a balance of probabilities, rebutted the presumption of possession of the drugs under s 37(d) of the DDA and had raised a reasonable doubt on the prosecution's case, especially with regard to the element of knowledge. The appellant's reference to 'Mickey' was certainly not an afterthought. He had referred to 'Mickey' (or 'Mr Tee') at his earliest opportunity and was allowed to make a phone call to 'Mickey' after he was arrested — but none of these matters were put to the prosecution's witnesses. And although the appellant's hand phone was seized, no investigation was done on the call logs. This had hampered the appellant's defence and contributed to his denial of a fair trial. These facts, when assessed and appreciated, raised a reasonable doubt as to whether the appellant had knowledge of the drugs in P2 (see paras 79–80 & 82–83).

(4) The Court of Appeal's decision to order the appellant's retrial was bereft of any legal basis. The appellant had been imprisoned for eight years, six of which were on death row. Based on the authorities, it was apparent that the COA had failed to take into consideration matters it should have had regard to and, consequently, substantial injustice was caused to the appellant in that the appellant, who had been imprisoned for a considerable time, would have been subjected to the rigmarole of yet another trial. The COA's decision in ordering a retrial was untenable (see paras 64 & 72).

Obiter dicta:

(1) Retrials were governed by legal principles and, in this respect, this court agreed that: (a) when considering whether to exercise its discretion to order a retrial, the court must have regard to the interval of commission of the offence and whether that would prejudice the accused's defence; (b) memories fade and witnesses die or leave the country. A retrial in this sense might prejudice the accused and it must also be considered whether it would give the prosecution a second bite of the cherry; (c) retrials ought not to be ordered if the accused's case had been pending for at least four years; and (d) retrials might not be the just and appropriate order if the accused had already spent time in prison; this was particularly so in cases where the accused was imprisoned pending the sentence of death (see para 64).

[Bahasa Malaysia summary

Selepas perbicaraan, Mahkamah Tinggi mendapati perayu, seorang Yamani, bersalah atas pertuduhan mengedar 1,800.28g methamphetamine ('dadah') dan menjatuhkan hukuman mati menurut s 39B(2) Akta Dadah Berbahaya 1952 ('ADB'). Pegawai Kastam menemui dadah itu ketika pengimbasan beg ('P2') yang berada dalam milikan perayu sejurus selepas dia tiba di Lapangan Terbang Tawau, Sabah dengan penerbangan dari Kuala Lumpur. Dalam pembelaannya di dalam perbicaraan itu, perayu memberi keterangan bahawa

dia tidak mempunyai pengetahuan mengenai dadah di dalam P2; bahawa P2 diserahkan paket yang padat oleh abang ipar isterinya ('Mickey' atau 'Encik Tee') untuk dihantar kepada rakan di Tawau; dan bahawa perayu telah mendedahkan nombor telefon rakan Mickey dalam kenyataannya kepada polis serta peguamnya di dalam perbicaraan. Walau bagaimanapun, hakim perbicaraan mendapati bahawa satu-satunya pembelaan yang dibangkitkan oleh peguam perayu pada perbicaraan adalah bahawa terdapat percanggahan dalam berat badan dadah antara yang direkodkan oleh pegawai Kastam pada masa penangkapannya dan berat yang direkodkan oleh ahli kimia kerajaan yang mana dadah dihantar untuk analisis. Mahkamah perbicaraan menangani isu ini dan memihak kepada pihak pendakwaan, dan memutuskan bahawa dadah yang dirampas daripada P2 adalah yang dikemukakan di Mahkamah. Walau bagaimanapun, berhubung dengan keterangan perayu bahawa dia tidak mempunyai pengetahuan mengenai dadah dalam P2 dan isu 'Mickey', mahkamah perbicaraan mendapati bahawa perkara-perkara ini tidak pernah dikemukakan oleh peguam perayu kepada saksi-saksi pendakwaan semasa pemeriksaan balas. Akibatnya, hakim perbicaraan membuat kesimpulan pada akhir perbicaraan bahawa 'Mickey' adalah watak yang direka oleh perayu dan cerita perayu adalah hanya penafian yang tidak mencukupi untuk mengakas anggapan di bawah s 37(d) ADB, bahawa dia mempunyai pengetahuan tentang dadah dalam P2. Mahkamah perbicaraan mendapati bahawa pihak pendakwaan telah membuktikan kesnya di luar keraguan munasabah untuk menjamin sabitan dan hukuman. Dalam rayuannya kepada Mahkamah Rayuan ('MR') terhadap keputusan itu, perayu menegaskan bahawa dia telah dinafikan perbicaraan yang adil kerana ketidakcekapan peguam perbicaraannya yang hanya mengemukakan percanggahan yang didakwa dalam berat badan dadah sebagai satu-satunya pembelaan. Perayu berhujah bahawa walaupun isterinya (DW2) hadir di dalam perbicaraan itu, peguamnya tidak pernah memanggilnya sebagai saksi untuk mengesahkan ceritanya; peguam juga tidak membuat sebarang hujahan pada penutupan kes pendakwaan dan tidak hadir apabila keputusan dalam kes itu disampaikan. Perayu kemudiannya mendapati bahawa peguam perbicaraannya mempunyai sakit barah dan telah meninggal dunia sebelum keputusan dalam perbicaraan itu disampaikan. Berdasarkan penyerahan perayu dan bukti tambahan bahawa dia dibenarkan untuk membuat pengemukaan keterangan di dalam rayuan itu, MR mendapati bahawa peguam perbicaraan perayu tidak kompeten dan perayu telah dinafikan perbicaraan yang adil. MR bagaimanapun, tidak membebaskan dan melepaskan perayu tetapi memerintahkan perbicaraan semula atas alasan bahawa tidak ada kesalahan di pihak pendakwaan dan bahawa jika perayu dibebaskan dan dilepaskan, ianya akan memberi gambaran bahawa pembebasan rayuan boleh dibuat dengan alasan peguam yang telah mengendalikan pembelaannya tidak kompeten.

Diputuskan, membenarkan rayuan; melepas dan membebaskan perayu:

(1) Berdasarkan prinsip keadilan, Mahkamah Rayuan ('MR') tidak sepatutnya memerintahkan perayu dibicarakan semula — tetapi sepatutnya membebaskan dan melepaskannya — selepas mendapati bahawa ketidakcekapan peguamnya telah menafikan perayu perbicaraan yang adil dan menyebabkan dia tidak mendapatkan keadilan (lihat perenggan 81).

(2) Mengenai penilaian keterangan tambahan yang telah dikemukakan di MR, MR dengan betul mendapati bahawa peguam perayu di perbicaraan telah: (a) gagal dalam tugasnya untuk meletakkan kes pembelaan kepada saksi-saksi pendakwaan semasa pemeriksaan balas dengan itu menyebabkan hakim perbicaraan mendapati bahawa naratif perayu mengenai 'Mickey' dan keseluruhan transaksi yang melibatkannya — yang dibangkitkan buat kali pertama semasa kes pembelaan — adalah pemikiran terkemudian; (b) enggan untuk mempertimbangkan naratif perayu dan sebaliknya mengutamakan pembelaan tunggal mengenai percanggahan dalam berat badan dadah — yang menyebabkan hakim perbicaraan dengan betul didapati tidak mencukupi untuk menimbulkan keraguan munasabah terhadap kes pendakwaan; (c) mengelakkan mengutamakan naratif sebenar perayu yang akan mempunyai peluang yang lebih baik untuk membebaskannya; (d) gagal memanggil isteri perayu (DW2) untuk memberi keterangan walaupun dia hadir di perbicaraan. Buktinya boleh menguatkan percanggahan perayu bahawa dia tidak mempunyai pengetahuan tentang dadah dalam P2 dan dadah tersebut dibungkus secara padat dan diserahkan kepadanya oleh 'Mickey'. Keterangannya juga mungkin tidak menyebabkan hakim perbicaraan menolak 'Mickey' sebagai watak rekaan; dan (e) hanya bertemu perayu sekali di dalam penjara dan di mahkamah dan tidak membuat hujaan pada akhir kes pendakwaan (lihat perenggan 48–52).

(3) Mengenai keseluruhan penilaian keterangan, perayu dengan keseimbangan kebarangkalian, mengakas anggapan pemilikan dadah di bawah s 37(d) ADB dan telah menimbulkan keraguan yang munasabah terhadap kes pendakwaan, terutamanya berkenaan dengan elemen pengetahuan. Rujukan perayu kepada 'Mickey' sudah tentu bukanlah satu pemikiran terkemudian. Dia telah merujuk kepada 'Mickey' (atau 'Encik Tee') pada awal kes dan dibenarkan membuat panggilan telefon kepada 'Mickey' selepas dia ditangkap — tetapi perkara ini tidak dikemukakan kepada saksi pendakwaan. Walaupun telefon bimbit perayu telah dirampas, tiada siasatan dilakukan pada log panggilan. Hal ini telah menghalang pembelaan perayu dan menyebabkan perayu tidak mendapat perbicaraan yang adil. Fakta-fakta ini, apabila dinilai, menimbulkan keraguan yang munasabah sama ada perayu mempunyai pengetahuan tentang dadah dalam P2 (lihat perenggan 79–80 & 82–83).

(4) Keputusan Mahkamah Rayuan untuk memerintahkan perbicaraan

semula perayu adalah tidak mempunyai alasan undang-undang. Perayu telah dipenjarakan selama lapan tahun, berbaki enam tahun dan menunggu hukuman mati. Berdasarkan autoriti, adalah jelas bahawa MR telah gagal untuk mengambil kira perkara-perkara yang sepatutnya dan menyebabkan ketidakadilan yang nyata kepada perayu yang telah dipenjarakan untuk masa yang agak lama. Perayu akan dipenjarakan lebih lama sementara menunggu perbicaraan semula. Keputusan MR di dalam memerintahkan perbicaraan semula tidak dibenarkan (lihat perenggan 64 & 72).

Obiter dicta:

(1) Perbicaraan semula ditadbir oleh prinsip undang-undang dan mahkamah ini bersetuju bahawa: (a) apabila mempertimbangkan sama ada untuk menggunakan budi bicaranya untuk memerintahkan perbicaraan semula, mahkamah mestilah meneliti jurang kesalahan itu dan sama ada ianya akan memprejudiskan tertuduh; (b) saksi lupa, kematian saksi atau saksi meninggalkan negara ini. Perbicaraan semula mungkin menjejaskan tertuduh dan samaada ianya akan memberi pihak pendakwaan kes yang mudah dibuktikan; (c) perbicaraan semula tidak sepatutnya diperintahkan sekiranya kes tertuduh telah tertangguh selama sekurang-kurangnya empat tahun; dan (d) perbicaraan semula mungkin bukan perintah yang adil dan sesuai sekiranya tertuduh telah menghabiskan masanya di dalam penjara; hal ini terutamanya dalam kes-kes di mana tertuduh dipenjarakan sementara menunggu hukuman mati (lihat perenggan 64).]

Cases referred to

Ah Poon and Others v PP [2005] MLJU 566, HC (refd)
Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209, FC (refd)
Au Pui-kuen v Attorney General of Hong Kong [1979] 1 All ER 769, PC (refd)
Awaluddin bin Suratman & Ors v Pendakwa Raya [1992] 1 MLJ 416, HC (folld)
Azahan bin Mohd Aminallah v PP [2005] 5 MLJ 334, CA (folld)
Badan Pencegah Rasuah v Chong Chee Liong [2011] 1 MLJ 852; [2011] 1 CLJ 524, HC (refd)
Cumberbatch (Glyne) v R (2004) 67 WIR 48, CA (refd)
Dato' Seri Anwar bin Ibrahim v PP [2010] 2 MLJ 312, FC (refd)
Earl Pratt and another appellants v Attorney-General for Jamaica and another respondents [1994] 2 AC 1, PC (refd)
Hari Ram Seghal v PP [1981] 1 MLJ 165; [1980] 1 LNS 116 (refd)
Hiew Min Yong v PP [2001] 5 MLJ 1, HC (folld)
Lee Kwan Woh v PP [2009] 5 MLJ 301, FC (refd)
Machander Son of Pandurang v State of Hyderabad [1955] AIR 792, SC (refd)
Mohammad Farid bin Batra v PP and another appeal and other matters [2020] 1 SLR 907, CA (refd)

Mohd Hanafi bin Safii v PP [2013] 5 MLJ 87, CA (refd)
Mohinder Singh v The State 1953 AIR 415, SC (refd)
Nudd v R [2006] 4 LRC 278, HC (refd)
PP v Choo Chuan Wang [1992] 3 CLJ Rep 329, HC (refd)
PP v Gan Boon Aun [2017] 3 MLJ 12, FC (refd)
Seah Ah Chiew v PP [2007] 1 MLJ 377, HC (refd)
Shamim Reza bin Abdul Samad v PP [2011] 1 MLJ 471, FC (folld)
TKWJ v R (2002) 193 ALR 7, HC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(d)
Federal Constitution art 5, 5(1)

Muhammad Shafee bin Abdullah (Wan Aizuddin bin Wan Mohammed and Rahmat bin Mohamed Hazlan with him) (Shafee and Co) for the appellant.
Hanim bt Mohd Rashid (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Tengku Maimun Chief Justice (delivering judgment of the court):

INTRODUCTION

[1] This appeal is an apt example of the crucial role played by defence counsel in a criminal trial and how their flagrant incompetence might jeopardise the accused's right to a fair trial — a right guaranteed by art 5(1) of the Federal Constitution and which comprises a fundamental tenet of the rule of law.

THE BACKGROUND FACTS

[2] The appellant, a Yemeni, was charged in the High Court in Sabah and Sarawak at Tawau for the following offence:

> THE CHARGE:
>
> That you on the 25th day of July 2013 at about 11.00 a.m. at the arrival hall of Tawau Airport in the District of Tawau, in the State of Sabah did on your own behalf, traffic in a dangerous drug, to wit 1,800.28 grams of Methamphetamine and that you have thereby committed an offence under section 39B(1)(a) of the Dangerous Drugs Act 1952 punishable under section 39B(2) of the same Act.
>
> PUNISHMENT:
>
> Shall be punished on conviction with death.

THE PROSECUTION'S CASE

[3] On 25 July 2013, the appellant travelled by flight from Kuala Lumpur to Tawau, Sabah. The immigration officer who was on duty, one Amri bin Awang ('PW1'), had, in the usual course of his duties inspected the appellant's passport and noted that his social visit pass had expired.

[4] PW1 referred the matter to his superior and at that time, was informed by the appellant that he (the appellant) had with him some luggage ('P2') on the floor next to the luggage carousel. The facts disclosed that P2 was the only remaining luggage at the carousel. PW1 then sought the assistance of two other customs personnel namely Ombra @ Omrah bin Saibillah ('PW2') and Suhaina bt Hussein ('PW6') to inspect and scan P2.

[5] Upon scanning, PW2 noticed a suspicious image in P2 and accordingly instructed the appellant to open the bag. This the appellant did with a key he had in his possession. Once opened, PW2 observed a transparent plastic package in the inner compartment of the bag.

[6] Mario Domingo ('PW10') from the Preventive Section of the Customs Office arrived at the scene and instructed the appellant to open P2. The appellant again, did so using the key he had. PW10 similarly noticed the transparent plastic package containing a crystalline substance. Using a test kit, PW10 conducted an initial drug test which revealed the identity of the substance as methamphetamine. This led to the arrest of the appellant.

[7] Upon analysis by the chemist, Biling ak Peter Raig ('PW9'), the crystalline substance was confirmed to be methamphetamine weighing grams, the subject matter of the charge.

FINDINGS OF THE TRIAL JUDGE AT THE END OF THE PROSECUTION'S CASE

[8] At the close of the prosecution's case, the learned judicial commissioner ('JC') found that the prosecution had proved the following ingredients to make out a prima facie case against the appellant, namely:

(a) that the appellant had possession of the said drugs;

(b) that the drugs were dangerous drugs, namely, methamphetamine; and

(c) that the appellant had trafficked the said drug.

[9] On the elements of possession which are twofold, that is to say, the physical element and the mental element, the learned JC determined that the

physical element of custody and control had been made out because P2 belonged to the appellant and because the appellant claimed P2 to be his. On the mental element, the learned JC invoked the presumption under s 37(d) of the Dangerous Drugs Act 1952 ('the DDA') to find that the appellant had knowledge of the drugs in P2.

[10] As regards the nature and quantity of the drugs, the learned JC accepted the evidence of PW9 on the usual process undertaken when conducting an analysis of the drugs. His Lordship dealt with the issue raised by the defence, which was the only line of defence raised in the trial, namely on the discrepancy in the weight of the drugs as testified by PW9 and PW10.

[11] It was the evidence of PW10 that the weight of the drugs was 4kg while PW9 testified that the weight was 1,800.28g. The learned JC noted that the weighing machine used by PW9 was a duly calibrated weighing machine while the one used by PW10 was not calibrated. Having considered the evidence adduced by the prosecution on the handling of the drugs from the time it was seized until it was handed over to PW9, the learned JC was satisfied that the drugs seized from the appellant was the one produced in court weighing 1,800.82g.

[12] The learned JC found that a case of actual trafficking had been made out under the definition of 'trafficking' in s 2 specifically, the element of 'carrying', premised on the fact that the appellant was carrying the bag, P2 containing the drugs from Kuala Lumpur to Tawau.

[13] Having found that the prosecution had made out a prima facie case, the appellant was ordered to enter upon his defence.

THE DEFENCE'S CASE

[14] In his evidence given under oath, the appellant essentially testified that he was asked by a friend named 'Mickey' to deliver the bag, P2 to Mickey's friend. To this effect, the appellant testified that Mickey had given the appellant the telephone number of Mickey's friend.

[15] The appellant further testified that Mickey gave the appellant RM1,000 as spending money in Tawau. According to the appellant, Mickey is the brother in law of the appellant's wife. It was also the evidence of the appellant that it was Mickey who packed P2 for him. As such, the appellant claimed that he had no knowledge of the contents of P2.

[16] The learned JC observed that the appellant's version that he had no knowledge of the drugs in P2 and the character Mickey was never put to the

prosecution's witnesses. His Lordship found that there was no evidence that the appellant and Mickey had special relationship to justifying Mickey to pack P2 when the most reasonable thing for the appellant to do was to ask his wife to pack the bag for him.

[17] His Lordship concluded that this line of defence was illogical and an afterthought invented by the appellant and that Mickey is merely a 'makeup story' of the appellant. The defence was found to be one of denial and insufficient, on a balance of probabilities, to rebut the presumption of knowledge under s 37(d) of the DDA. The learned JC also found that the prosecution had proved its case against the appellant beyond reasonable doubt. The appellant was thus convicted and sentenced to death.

[18] Aggrieved by the decision of the High Court, the appellant filed an appeal to the Court of Appeal.

AT THE COURT OF APPEAL

[19] It is important to mention that the appellant was represented by a different set of lawyers in the Court of Appeal and before us. His previous counsel at the trial court passed away before the High Court handed down its decision at the conclusion of the trial.

[20] Also pertinent to mention is the fact that before the appeal was heard in the Court of Appeal, the appellant applied to adduce fresh evidence, which application was allowed by another panel of that court.

[21] The additional evidence was led through the following witnesses:

(a) the appellant ('DW1'), who was actually recalled;

(b) Hidirova Dilnoz ('DW2') — the appellant's wife; and

(c) Ahmed Faisal Mohd Al-Moafa ('DW3') — Former Economics and Consular Affairs Officer to Yemeni Embassy in Malaysia.

[22] The most prominent testimonies are those of DW1 and of DW3.

The additional evidence

[23] The following is the summary of DW1/the appellant's testimony as reproduced from his written submission:

(a) during the appellant's first meeting with his counsel in prison, the appellant had given his counsel a detailed briefing of the circumstances which led to his arrest at the Tawau Airport. The appellant testified that

A he had told his counsel that the appellant had been under the impression that he was delivering some presents on Mickey's behalf. Further, the appellant testified that Mickey is the brother-in-law of his wife (DW2). The appellant stated that he had told his trial counsel that it was only upon his arrest that he became aware that the bag he was carrying contained dangerous drugs;

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(b) the appellant testified that Mickey who was referred to in his caution statement, was disclosed at the earliest opportunity upon his arrest. The appellant explained that he did refer to Mickey but used the codename 'Mr Tee'. The reason the appellant did this was because Mickey told the appellant not to mention the fact of Mickey to anyone so that Mickey could go to Tawau to help the appellant. According to the appellant, he had informed his counsel of the reason for these inconsistencies; and

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D (c) the appellant also stated in his recall evidence that he had given the full narrative of his defence to his counsel who said that he would study it and revert to the appellant. However, counsel never met the appellant in prison after that first meeting and their only encounter after that was a brief one in court. There, counsel informed the appellant that he would only raise the issue of the discrepancy in the weight of the drugs and did not further discuss any other grounds of defence with the appellant.

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[24] DW3 was also an important witness and his evidence taken together with DW1 and DW2's testimonies are summarised as follows:

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(a) several months after the appellant's arrest, DW3 was tasked by the Yemeni embassy to oversee the appellant's case. For this purpose, DW3 visited the appellant in prison. The appellant informed DW3 of the facts above as to his counsel's treatment towards his case and how counsel also pressed the appellant for his fees to be paid in full;

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(b) DW3 said the appellant also informed that he insisted for DW2 to be brought to the trial court to testify that Mickey was indeed her brother-in-law. Exhibit D3, which is DW2's passport shows that she did in fact travel to Tawau sometime in October 2014 and which corroborates the fact that DW2 was present in court to testify on behalf of the appellant. However, both DW1 and DW3 testified that the counsel did not deem it fit to call DW2 as a witness. The appellant's counsel gave no reasons for refusing to call DW2; and

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I (c) the additional evidence also disclosed that the appellant's counsel did not present any submission at the close of the prosecution's case and that he was absent during the decision at the close of the defence's case. The appellant testified that his counsel did inform him a short while before

the verdict that the counsel was suffering from cancer but it was only a few months after the decision that the appellant was actually told that his counsel had died.

[25] The appellant's appeal to the Court of Appeal was solely on the point that his trial counsel was flagrantly incompetent resulting in a breach of his constitutionally guaranteed right to a fair trial. Put another way, the issue before the Court of Appeal was whether the appellant had been deprived of a fair trial such that a miscarriage of justice had occasioned which warrant the appellant's acquittal and discharge.

[26] The Court of Appeal considered the law in respect of the appellant's contention that his counsel who conducted the case at the trial court was incompetent. It relied on the decision of this court in *Shamim Reza bin Abdul Samad v Public Prosecutor* [2011] 1 MLJ 471 ('Shamim Reza') for the proposition that anyone claiming unfair trial in this context must establish that his counsel was not just incompetent but flagrantly incompetent. In particular, the following passage of *Shamim Reza* was quoted:

> [6] ... In our considered judgment, the incompetence of counsel in the conduct of a defence in a criminal trial is a ground on which a conviction may be quashed provided that: (i) such incompetence must be flagrant in the circumstances of a given case; and (ii) it must have deprived the accused of a fair trial thereby occasioning a miscarriage of justice. Nothing short will suffice. And in considering the question, an appellate court must have regard to the conduct of counsel as a whole and not merely to his or her failure in one or two departments. Further, in the ordinary way, a court whether at first instance or at the appellate stage will of course have regard to its paramount function and duty to ensure that justice is done so that the incompetence of counsel will not factor into the equation.

[27] Having laid down the law, the Court of Appeal proceeded to examine the facts pertaining to what was done or not done by the appellant's counsel. The following is the Court of Appeal's findings:

(a) that the appellant's counsel had only challenged the prosecution's witnesses on the weight of the drugs. No other defence was raised by the appellant's counsel in cross-examining the prosecution's witnesses;

(b) that the appellant's counsel had taken an untrue and a precarious position at the trial court; untrue because the appellant's defence was that P2 containing the drugs were given to him by Mickey and the appellant was not aware of the drugs in P2;

(c) that it was indeed flagrantly incompetent for the appellant's counsel not to cross-examine the prosecution's witnesses on this particular defence;

(d) that this would mean that the appellant had been deprived of a fair trial;

(e) that the failure to cross-examine the prosecution's witnesses on the defence that the appellant was not aware of the drugs in the bag was indeed a matter so serious that it would have materially affected the appellant's version of his innocence;

(f) that the trial judge's finding that the appellant's defence was an afterthought was due to the flagrant incompetency of the appellant's counsel in not introducing and pursuing this defence at the prosecution's stage; and

(g) merely relying on the sole defence of the weight of the drugs showed the flagrant incompetence of the appellant's counsel and this had deprived the appellant of a fair trial, thereby occasioning a miscarriage of justice.

[28] In short, the Court of Appeal found that the two conditions or grounds stipulated in *Shamim Reza* to quash the appellant's conviction were satisfied. Notwithstanding the above, the Court of Appeal did not make an order that the appellant be acquitted and discharged. Instead, the Court of Appeal ordered for a retrial.

[29] The reason for the retrial is that the prosecution cannot be faulted for the incompetency of defence counsel and a retrial would be the more appropriate order in the interests of justice. The Court of Appeal opined that ordering an acquittal and discharge would make it 'far too easy for an accused to be acquitted and discharge (sic) by engaging counsel who would by design not handle the case properly.'

OUR DECISION/ANALYSIS

[30] We were of the view that the Court of Appeal correctly found that the appellant's counsel was flagrantly incompetent and that the appellant's right to a fair trial was breached.

[31] Our views on the issue of breach of right to a fair trial and on incompetent counsel are addressed below.

The right to a fair trial and incompetent counsel

[32] It is beyond argument that art 5(1) of the Federal Constitution fundamentally guarantees the right to a fair trial. This is encompassed in the words 'save in accordance with law'. In other words, it is only through the process of law that a person may be deprived of his life or personal liberty.

[33] That art 5(1) guarantees the right to a fair trial is etched into our case law. See for example the two judgments of this court in *Dato' Seri Anwar bin*

Ibrahim v Public Prosecutor [2010] 2 MLJ 312 at [49] and *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12 at [13]. A

[34] There is another important case which bears mention, that is, the judgment of the High Court in *Public Prosecutor v Choo Chuan Wang* [1992] 3 CLJ Rep 329. Not only does the case unequivocally state that art 5(1) of the Federal Constitution recognises the right to a fair trial, but it also explains the general effect of the breach of that right as follows, at p 333 per Edgar Joseph Jr J: B

> In the circumstances, applying a generous interpretation and avoiding the 'austerity of tabulated legalism', I would respectfully agree with the decisions of the Indian Supreme Court and hold that art 5(1) of our Constitution does imply in favour of an accused person the right to a fair hearing within a reasonable time by an impartial court established by law. It follows that if an accused person can establish a breach of this right then, in the words of Sandhawalia CJ in *Madheshwardhari Singh v The State* (ibid), he would be entitled to an unconditional release and the charges levelled against him would fall to the ground. C D

[35] In *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301, this court stated thus: E

> [18] Drawing the threads together, it is clear from the authorities that it is a fundamental right guaranteed by art 5(1) that a person's life (in its widest sense) or his or her personal liberty (in its widest sense) may not be deprived save in accordance with state action that is fair both in point of procedure and substance. Whether an impugned state action is substantively or procedurally fair must depend on the fact pattern of each case. *However, when the principle is applied to a criminal case, what it means is that an accused has a constitutionally guaranteed right to receive a fair trial by an impartial tribunal and to have a just decision on the facts. If there is an infraction of any of these rights, the accused is entitled to an acquittal.* Whether there has been a fair trial by an impartial tribunal or a just decision depends on the facts of each case. While upon the subject under discussion we would refer with approval to the judgment of Edgar Joseph Jr J (as he then was) in *Public Prosecutor v Choo Chuan Wang* [1992] 3 CLJ Rep 329, where he held that: F G
>
> > Article 5(1) of our Constitution does imply in favour of an accused person the right to a fair hearing within a reasonable time by an impartial court established by law. It follows that if an accused person can establish a breach of his right then, in the words of Sandhawalia CJ in *Madheshwardhari Singh v The State* (ibid) (*Madheshwardhari Singh and anor v The State of Bihar* AIR (Pat) 1986 324), he would be entitled to an unconditional release and the charges levelled against him would fall to the ground. H I

[36] The above passage although relates to hearings before a fair and impartial tribunal is capable of a wide enough construction to refer to the consequence of a breach of the right of fair trial in the context of a criminal case.

A The principle in the passage cited is that where an accused person is denied his right to a fair trial, the result of that breach warrantsp an acquittal and discharge.

B **[37]** And in *Shamim Reza*, this court has emphatically recognised that the right to be represented by competent counsel is a crucial aspect of the right to a fair trial. While on the facts of that case this court found that the counsel was incompetent, he was not flagrantly incompetent to the extent that the conviction was bad in law. This court however was quick to point out at para [5] that what constitutes an 'extreme case' or 'flagrant incompetency' remains C to be decided on the facts of each case.

[38] The same point was considered in *Mohd Hanafi bin Safii v Public Prosecutor* [2013] 5 MLJ 87 where the Court of Appeal arrived at the same D conclusion as *Shamim Reza*.

[39] Apart from Malaysian cases, cases in the other Commonwealth jurisdictions also recognised that in certain instances, the incompetence of counsel might result in an unfair trial rendering the conviction bad. The E Australian High Court recognised this in *Nudd v R* [2006] 4 LRC 278 ('Nudd') as did the Singapore Court of Appeal in *Mohammad Farid bin Batra v Public Prosecutor and another appeal and other matters* [2020] 1 SLR 907 ('Farid Batra') though, in both cases, the courts found that there was no breach of right to a fair trial.

F

[40] Despite the observations made in those cases that there was no violation of right to a fair trial, the respective apex courts in *Nudd* and *Farid Batra* expressly held that the standard of incompetency must be assessed objectively. These principles are thus widespread and are universally acknowledged. In G *Nudd* for example, Gleeson CJ observed that the principles accepted in Australia are also recognised in the United States and Canada. His Honour Gleeson CJ said as follows:

> [13] In the United States and Canada accused persons have a constitutional or quasi-constitutional right to *effective* assistance from counsel. Yet, even in those H jurisdictions, the courts have been concerned to stress the objective nature of the standard to be applied and the significance for the concept of miscarriage of justice of the adversarial context. In *Strickland v Washington* (1984) 466 US 668 at 669 the Supreme Court of the United States held that, when a complaint is made of counsel's ineffectiveness, the appellant must show both that counsel's conduct fell I below an objective standard of reasonableness and that prejudice resulted. O'Connor J, writing for the majority, described ((1984) 466 US 668 at 687) prejudice thus:
>
> > This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable ... a breakdown in the

adversary process that renders the result unreliable. A

[41] Even prior to *Nudd*, the High Court of Australia appeared to endorse the 'flagrantly incompetent' test and highlighted the deleterious effect such an incompetent counsel has on the right to a fair trial. In *TKWJ v R* (2002) 193 ALR 7 ('TKWJ'), McHugh J said thus: B

> [76] In some cases, the conduct of counsel may be such that it has deprived the accused of a fair trial according to law. If the conduct of counsel has resulted in an unfair trial, that of itself constitutes a miscarriage of justice. If, for no valid reason, counsel fails to cross-examine material witnesses or does not address the jury, for example, the accused has not had the trial to which he or she was entitled. In such a case, the failure of counsel to conduct the defence properly is inconsistent with the notion of a fair trial according to law. It cannot be right to insist that the appeal can succeed only if the court thinks that counsel's conduct might have affected the verdict. To require the accused to persuade the court that the conduct might have affected the verdict comes close to substituting trial by appellate court for trial by jury. *No matter how strong the prosecution case appears to be, an accused person is entitled to the trial that the law requires. In principle, therefore, where the trial has been unfair, the accused should not have to show that counsel's conduct might have affected the result.* C D E
>
> [77] But in other cases — perhaps the majority — the conduct of counsel — although irregular — will not necessarily deprive the accused of a fair trial. Not every error makes the trial unfair. Nevertheless, the irregular conduct of counsel may have affected the outcome. And a miscarriage of justice always occurs when there is a significant possibility that a material irregularity at the trial has resulted in the conviction of an accused person. (Emphasis added.) F

[42] Precedents from the United States and Canada (which were cited with approval in *Nudd*), in this context, are especially persuasive because those jurisdictions, like us, have written constitutions or express guarantees of fundamental liberties including the right to a fair trial. The fact that jurisdictions like the United Kingdom and Australia have followed these standards in recognising this aspect of fair trial rights despite the absence of the said express guarantees is all the more reason to consider the law as being universally accepted. G H

[43] At this juncture, it is safe to say that it is not unheard of (at least conceptually) for courts to set aside convictions by finding that there was an unfair trial on the ground that counsel was flagrantly incompetent such that effectively, there was no right to counsel. In other words, based on a series of decided cases, where the conduct of the counsel in the trial process gives rise to a miscarriage of justice, it is incumbent upon the court to set aside the conviction. I

[44] Taking heed from high authorities, the test in all cases when considering whether there was a breach of fair trial as a result of incompetent counsel is to ask the question whether the incompetency was flagrant, such that it caused or gave rise to a miscarriage of justice. As explained by McHugh in *TKWJ*:

> *A test such as 'flagrant incompetent', while a convenient label may show that a miscarriage of justice has occurred in a particular case, is unhelpful in determining whether there has been a miscarriage of justice within the terms of s 6(1) of the Criminal Appeal Act. Whether there has been a miscarriage of justice is the ultimate issue that the court must decide*. (Emphasis added.)

Thus, the focus of the inquiry by the court is not on the advocacy skills or performance of trial counsel, rather it is the acts or omissions themselves as they impact on the fairness of the trial and whether the result constitute a miscarriage of justice.

[45] In this regard, those of us in the legal profession must recognise that there is a large influx of members of the Bar. Some are obviously more renowned than others for various reasons such as advanced experience and general access to information and network. There will always be the case where an accused person is dissatisfied with the standard of advocacy of his counsel. However, where counsel fails to abide by certain standards or does something another lawyer would have done differently, the accused or litigant's recourse is to the disciplinary or complaints mechanism established by law — or perhaps write a bad review. He is not otherwise entitled to use subjective or perceived notions of incompetency as a reason to complain about his conviction.

[46] Be that as it may, in extreme cases, assessed objectively, where counsel has acted far below the accepted standard such that his flagrant incompetency jeopardises the accused person's right to a fair trial, the overall purpose of art 5(1) of the Federal Constitution — which is to deprive life or personal liberty only according to law — would be rendered illusory. As such, in those circumstances, the just thing to do would be to set aside the conviction.

[47] At this point, what remains to be addressed is our reasons for agreeing with the Court of Appeal to the extent that the appellant's counsel was flagrantly incompetent such that the conviction ought to have been set aside and our reasons for departing from the decision of the Court of Appeal on the retrial.

[48] On an objective assessment of the additional evidence, we found that the Court of Appeal was correct to hold that the appellant's counsel was flagrantly incompetent occasioning in a miscarriage of justice to the appellant based on the following.

[49] Firstly, the appellant would only be addressing the court as to his defence during the defence's case. During the defence's case, the appellant revealed for the first time the fact of Mickey and the entire transaction involving him. The JC found that the appellant's narrative was an afterthought invented to support his testimony during the defence's case as this was never put in cross-examination during the prosecution's case. At the prosecution's case, it was the duty of his counsel to effectively cross-examine the prosecution's witnesses, which his counsel failed to do. The overall impression created in the mind of the JC arose as a result of counsel's failure to cross-examine the prosecution's witnesses as he should and to lead evidence of the defence on this fact.

[50] Secondly, and following from the first, the appellant's counsel refused generally to consider the appellant's narrative and instead chose to mount another defence for him, namely, the discrepancy in the weight of the drugs. The learned JC correctly found that the discrepancy in itself is not a sufficient ground to cast reasonable doubt on the prosecution's case. The appellant's counsel avoided advancing the appellant's actual narrative which would have stood a better chance of exonerating him.

[51] Thirdly, and further on the point of exonerating evidence, the appellant was the only witness who was called. In the appellant's evidence, he denied having knowledge of the dangerous drugs and to support that assertion, he further posited the defence that Mickey packed his bag for him. The JC disbelieved this for the questionable reason that the appellant's wife should have logically packed the bag for him. The learned JC would have perhaps arrived at a different conclusion if there was evidence before him on the fact that Mickey was not just some random stranger but was known to the appellant because Mickey was the appellant's wife (DW2)'s brother-in-law. To this effect, DW2 made her way to the court in Tawau to testify but the appellant's counsel refused to put her on the stand.

[52] Fourthly, taking DW1's additional evidence at face value as supplemented by DW3, the trial counsel barely met with the appellant (only once in prison and once more briefly in court). The appellant's counsel made no submissions at the close of the prosecution's case and unfortunately, had passed away such that he could not be present for the decision at the end of defence's case.

[53] As stated by the Court of Appeal, it does not matter whether the appellant's defence was a weak or a strong one. The crucial point here is that the appellant, accused of a capital crime, should have had his day in court to posit

A the truth as to the events leading to the charge. The appellant was in essence, actively denied the right to advance his own case by his own counsel. His right to a fair trial had thus been violated.

B **[54]** In this regard and in response, learned deputy public prosecutor ('DPP') argued that the prosecution was not at fault in this case to warrant an acquittal and discharge on what is a perceived technicality. This was a sentiment accepted by the court below. The learned DPP further argued that nullifying the conviction on the ground that counsel was flagrantly incompetent would open the floodgates for this kind of argument in the future.

C

[55] We will first deal with the 'fault' point. The prosecution is but one aspect of the administration of justice albeit a significant one. The system is made up of many other actors including the judge, defence counsel, the police, interpreters and various other parties. The core of the criminal justice system is
D to dispense justice to the public for the wrongs committed by the 'criminal'. In this regard, the primary duty of the prosecution, after determining that there is a sound case and preferring a charge, is to marshal and lead evidence pointing towards guilt.

E

[56] The entire system of law that we have curated in our democratic system of government therefore means that the prosecution does not have the ultimate say in the guilt or innocence of a person. That is the exclusive duty and role of the courts. In this regard, the prosecution must not approach all cases with the
F mindset that they must secure a conviction at all costs in the same way defence counsel must not entertain the idea that he must secure an acquittal at all costs. Their paramount duty, apart from their duties to their clients (defence) or the public/state (prosecution), is to conduct the trial in a candid, honest and fair manner so that the ultimate truth of the case is presented to the court.

G

[57] Now, if any of these numerous components of the machinery of the justice system fail to function correctly, the entire administration of justice will collapse. Trials would become merely a façade or an act to simply secure a conviction without regard to the due process of law which assumes that all
H persons are innocent unless proven otherwise. The passage we quoted earlier from the judgment of McHugh J in *TKWJ*, clarifies this point beyond doubt. As such, the strength of the prosecution's case is irrelevant if the accused is not given a fair trial as required by art 5(1) of the Federal Constitution. And the question of fault simply does not arise.

I

[58] In *Hari Ram Seghal v Public Prosecutor* [1981] 1 MLJ 165; [1980] 1 LNS 116, the High Court exercised its revisionary powers to quash a conviction and sentence passed by the magistrate's court as the records of appeal have become unobtainable. In considering whether to order a retrial,

Wan Yahya J (as he then was) noted that the prosecution was blameless in this unfortunate episode. His Lordship observed that what the court was concerned at that stage was not so much as to the verdict of the prosecution's or the magistrate's fault, but how to provide a just remedy to the applicant's case.

[59] With respect, we also disagreed with learned DPP that the issue of flagrant incompetence of the trial counsel was a mere 'technicality'. In our considered view, in the circumstances of the present appeal, the flagrant incompetence of the trial counsel affected the outcome of the trial by depriving the appellant a fairly open chance of acquittal. It is clear that some failures of the trial counsel, as we have alluded to earlier, had resulted in a trial that did not meet the minimum standard of fairness as envisaged in art 5(1) of the Federal Constitution and had caused a miscarriage of justice.

[60] This brings us to the floodgates point. Learned DPP argued that if we were to accept the argument that convictions can be nullified because of defence counsel's flagrant incompetence, accused persons could purposely appoint incompetent lawyers to have their conviction overturned on appeal by virtue of such incompetency. The Court of Appeal seemed to accept this argument because it reiterated the same policy concern in its grounds of judgment at para 53, as follows:

> [53] ... If this order is made instead, it would be far too easy for an accused to be acquitted and discharge (sic), ie just by engaging counsels (sic) who would by design not handle the case properly and with certain standard (sic) expected in defending an accused person.

[61] With respect to the Court of Appeal and learned DPP, we find ourselves constrained to reject this assertion. The first reason has to do with the importance of the right to a fair trial that we have alluded to above. The prosecution's case is not the primary feature as the overall process must be fair. Otherwise, it cannot be said that the accused was deprived of his life or personal liberty in accordance with law.

[62] Further, the assertion that an accused person would by design engaged an incompetent counsel to secure an acquittal defies common sense and is itself utterly devoid of any logic. We cannot imagine a case in which any lawyer would be willing to sacrifice his own reputation and credibility at the Bar or before the Bench to deliberately be incompetent in defending his client. We also cannot imagine any accused person agreeing to a strategy of sacrificing his counsel by calling him incompetent with the aim to having another set of counsel working to acquit him on that point alone. The ramifications of even thinking about such a strategy is that the accused will have to languish in prison pending the hearing of his appeal, incur significant expenses in retaining new counsel to conduct the appeal or even run the risk of jeopardising his own

defence or evidence during the trial process. In any case, the threshold to prove a breach of fair trial requires not just incompetency but flagrant incompetency which is a high threshold and so the number of cases in which convictions can be overturned on this ground will be sparse.

[63] We now move to the point why we disagreed with the Court of Appeal on the order of retrial.

[64] In our judgment, the decision of the Court of Appeal in ordering for a retrial was, with respect, bereft of any legal basis. Retrials are governed by legal principles and in this respect, we agreed with learned counsel for the appellant on the following submission:

(a) when considering whether to exercise its discretion to order a retrial, the court must have regard to the interval of commission of the offence and whether that would prejudice the accused's defence;

(b) memories fade and witnesses die or leave the country. A retrial in this sense might prejudice the accused and it must also be considered whether it gives the prosecution a second bite of the cherry (see generally: *Badan Pencegah Rasuah v Chong Chee Liong* [2011] 1 MLJ 852; [2011] 1 CLJ 524);

(c) retrials ought not to be ordered if the accused's case has been pending for at least four years (see *Azahan bin Mohd Aminallah v Public Prosecutor* [2005] 5 MLJ 334);

(d) retrials might not be the just and appropriate order if the accused has already spent time in prison (see *Awaluddin bin Suratman & Ors v Pendakwa Raya* [1992] 1 MLJ 416; *Ah Poon and Others v Public Prosecutor* [2005] MLJU 566; and *Seah Ah Chiew v Public Prosecutor* [2007] 1 MLJ 377); and

(e) the above is particularly jarring in cases where the accused is imprisoned pending the sentence of death (see the judgment of the Supreme Court of India in *Mohinder Singh v The State* 1953 AIR 415).

[65] In *Mohinder Singh*, where the appellant had been imprisoned for more than a year, the Supreme Court of India declined to order a retrial. S Fazal Ali held that:

> In ordinary circumstances, we might have remanded the case for a fresh trial, but we consider that such a course would, in the present case, be unfair and contrary to settled practice, seeing that the appellant has been in a state of suspense over his sentence of death for more than a year.

[66] In *Machander Son of Pandurang v State of Hyderabad* [1955] AIR 792,

the prosecution invited the Supreme Court to order a retrial. That was not acceded to. In acquitting the appellant, Vivian Bose J said:

> The appellant was arrested in December 1950 and has been on his trial one way and another ever since, that is to say, for over 4 1/2 years. We are not prepared to keep persons who are on trial for their lives under indefinite suspense because trial judges omit to do their duty. Justice is not one-sided. It has many facets and we have to draw a balance between conflicting rights and duties. While it is incumbent on us to see that the guilty do not escape it is even more necessary to see that persons accused of crimes are not indefinitely harassed. They must be given a fair and impartial trial and while every reasonable latitude must be given to those concerned with the detection of the crime and entrusted with the administration of justice, limits must be placed on the lengths to which they may go.

[67] The same position was taken by the Court of Appeal of Barbados in *Cumberbatch (Glyne) v R* (2004) 67 WIR 48. In *Cumberbatch*, the appellant was not allowed sufficient time to prepare his defence. The Court of Appeal quashed the appellant's conviction as he was denied his right to a fair trial. In deciding not to order a retrial, the court considered the fact that five years have lapsed since the date of the offence and the fact that the appellant had been incarcerated for about two years. The appellant was thus acquitted.

[68] In *Au Pui-kuen v Attorney General of Hong Kong* [1979] 1 All ER 769, Lord Diplock said:

> ... the power to order a new trial must always be exercised judicially. Any criminal trial is to some degree an ordeal for the accused; it goes without saying that no judge exercising his discretion judicially would require a person who has undergone this ordeal once to endure it for the second time unless the interests of justice required it.
>
> ...
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> Their Lordships would not interfere with that court's exercise of its discretion in such a matter unless they were satisfied that it must have reached its decision as to whether or not to order a new trial by taking into consideration matters to which it ought not to have regard or by failing to take into consideration matters which it should have had regard, and that in consequence a substantial injustice had been done.

[69] In determining whether to order a retrial, this court in *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209 cited with approval the Privy Council decision of *Earl Pratt and another appellants v Attorney-General for Jamaica and another respondents* [1994] 2 AC 1. Edgar Joseph Jr FCJ said:

> For the sake of completeness, we would add that no attempt had been made by the learned deputy to ask for a retrial. In our opinion, the learned deputy was right in not having done so, considering that the appellant had lived in the shadow of the

gallows for all these years. In such a situation, it would have been approaching the confines of torture to have ordered a retrial. It is interesting to note that the judicial committee of the Privy Council has, in *Pratt v AG of Jamaica* [1994] 2 AC 1, observed (at p 35G) that, 'in any case in which execution is to take place more than five years after sentence, there will be strong grounds for believing that the delay is such as to constitute 'inhuman or degrading punishment or other treatment' within s 17(1) of the Jamaican Constitution.

[70] The length of incarceration that an appellant has been subjected to has been consistently considered by our courts. In *Azahan bin Mohd Aminallah*, the Court of Appeal held:

> ... we do not consider this to be a proper case to order a re-trial. The appellant had already served seven years imprisonment. In accordance with the settled practice of appellate courts, re-trials are generally not ordered in cases where the case has been pending against an accused for about four years ...

[71] The same approach was adopted in *Awaluddin bin Suratman* and *Hiew Min Yong v Public Prosecutor* [2001] 5 MLJ 1 where the appellate court in both cases held that an order of retrial was not appropriate considering that the appellants had already spent time in prison.

[72] In the instant appeal, the appellant has been imprisoned for eight years, six of which on death row. Applying the authorities cited above, it is apparent that the Court of Appeal had failed to take into consideration matters which it should have regard to, which had consequently caused substantial injustice to the appellant, in that the appellant who had been imprisoned for a considerable time will be subjected to another rigmarole of trial. We therefore found the decision of the Court of Appeal to order for retrial untenable.

[73] Learned DPP contended that it would be unfair to the public/the state if the appellant was acquitted and discharged simply on the ground that counsel was incompetent. With respect, the interest of the public/the State is not met simply by the prosecution securing convictions (see *Machander Son of Pandurang*). The larger purpose of the system of justice is to do justice to the citizenry. That aside, in making an order for retrial, courts must also be mindful of the resources utilised by all parties such as time, costs, and effort. Considerable time spent by the accused in prison also impacts on the machinery of the State and fairness for the accused, as ours is a system of rule of law and not rule by law.

[74] That, however, is not the end of the matter. The appellant (apart from the unfair trial point) also advanced the argument that in any event he had raised a reasonable doubt on the prosecution's case through the additional evidence.

[75] In essence, the JC held that the appellant's defence appeared to be illogical and manufactured. We have carefully scrutinised the evidence and found that there were several findings by the JC on the defence case which were not sustainable in light of the additional evidence.

[76] Firstly, the appellant claimed that he did not know the contents of P2 because he had given his clothing to be packed by Mickey. The JC disbelieved this on the grounds that logically, it should have been the appellant's wife who should have packed his bags. We note in passing that just because the appellant has a wife that does not mean that she is responsible for his packing. In any case, even though the appellant claimed that Mickey was his wife's brother in law, the JC found that there was no evidence to this fact.

[77] Secondly, and perhaps more crucially, the JC found that the existence of Mickey himself was in doubt as the fact of Mickey was not put by the appellant to the prosecution's witnesses coupled with the fact that the appellant never raised this to the Customs Officers when his statement was first recorded. The JC accordingly rejected his defence as being an afterthought.

[78] These two crucial findings, were with respect, themselves erroneous. Recalling what we said earlier, these facts never saw the light of day before the JC because the appellant's counsel was flagrantly incompetent. DW2, the appellant's wife, was present in court to testify and she would have been able to corroborate the fact that there was a special relationship between Mickey and the appellant.

[79] The appellant's defence by referencing Mickey was certainly not an afterthought. As explained earlier, the appellant did refer to Mickey at his earliest opportunity but referred to him as 'Mr Tee' instead under the erroneous assumption that Mickey would not have helped him out if he had revealed the truth to the authorities. According to the appellant, when he was arrested, he was allowed to make a call to Mickey. Mickey told the appellant not to disclose Mickey but to refer to Mickey as 'Mr Tee'. As mentioned earlier, none of this was put to the prosecution's case. It is also pertinent to state at this juncture that although the appellant's hand phone was seized, no investigation was done on the call logs.

[80] These facts which later came to light in the additional evidence, when assessed and appreciated, raised a reasonable doubt as to whether the appellant ie that the appellant trafficked in the said drugs was not proved.

CONCLUSION

[81] Based on the established principles of fairness, the Court of Appeal ought not to order the case for retrial given that it has made a finding of flagrant incompetence on the part of the appellant's trial counsel which had resulted in a miscarriage of justice. Applying *Shamim Reza* as it did, that finding is sufficient ground for the Court of Appeal to order that the appellant be acquitted and discharged.

[82] The appellant had been deprived of a fair trial as enshrined in art 5 of the Federal Constitution. On that ground alone the appeal should be allowed. And we would like to note that the failure of the prosecution to investigate the phone logs had also hampered the appellant's defence, thus contributing to the denial of a fair trial.

[83] We had nonetheless proceeded to consider the merits of the appeal and we found, on the totality of the evidence that the appellant had, on a balance of probabilities, rebutted the presumption of possession under s 37(d) of the DDA and had raised a reasonable doubt on the prosecution's case, especially on the element of knowledge.

[84] For all the above reasons, we were unanimous in our decision that the conviction of the appellant was unsafe. In the circumstances, the appeal was allowed and the appellant was acquitted and discharged.

Appeal allowed, appellant acquitted and discharged/

Reported by Ashok Kumar